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Supreme Court of the United States

OCTOBER TERM, 1941

NO. 1234

THE PEOPLES NATURAL GAS COMPANY and EDWARD M. BORGER, PRESIDENT, THE PEOPLES NATURAL GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

WILLIAM WATSON SMITH,
WILLIAM STANLEY,
MAX O'RELL TRUITT,
CARL MCFARLAND,
JAMES B. SAYERS,
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Petitioners,

v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, The Peoples Natural Gas Company, and Edward M. Borger, President, The Peoples Natural Gas Company, respectfully represent:

Summary Statement of the Matter Involved.

The Federal Power Commission (hereinafter usually referred to as the "Commission") on March 12, 1940, instituted an investigation (1) to determine whether The Peoples Natural Gas Company (hereinafter usually

referred to as the "Company") was subject to the jurisdiction of the Commission under the Natural Gas Act of June 21, 1938, c. 556 (52 Stat. 821; 15 USCA § 717 *et seq.*) and (2) to determine whether any rates charged by the Company subject to the Commission's jurisdiction were excessive and if so to reduce them (R. 3, 9). The Company denies that it is subject to the jurisdiction of the Commission under said Act because it is a local producing, gathering and distributing company and seeks to have the question of jurisdiction judicially decided before being subjected to a complete investigation of all of its properties, operations, investments, costs, depreciation, contracts, classifications and rates, such as the Commission proposes to make (R. 25).

The Company is incorporated under the laws of Pennsylvania to do business only in that state (R. 33). The Company is engaged in the business of producing, purchasing and distributing natural gas wholly within western Pennsylvania and supplies gas primarily to residents and industries in Pittsburgh and its environs (R. 31, 33). The entire management of the Company's business is conducted from its own office building in the City of Pittsburgh, Pennsylvania, which is its chief place of business. The Company neither owns, operates nor has any interest in any property outside of Pennsylvania (R. 33). The Company sells gas to over 150,000 consumers (R. 33).

All of the Company's rates, charges, classifications and sales are regulated by the Public Utility Commission of the Commonwealth of Pennsylvania, regardless of whether the sale be to an ultimate consumer or to another for resale to the ultimate consumer (R. 34, 42).

Since December 5, 1939, a small percentage of the Company's gas has been sold to the New York State Natural Gas Corporation, due to the sudden and unex-

pected exhaustion of the producing field in northwestern Pennsylvania and southwestern New York owned by said New York State Natural Gas Corporation (R. 35, 38). The gas sold by the Company to the New York State Natural Gas Corporation is delivered to the latter in Clarion County, Pennsylvania, approximately 100 miles from the Pennsylvania-New York state line (R. 37). Subsequent to said delivery in Clarion County, Pennsylvania, the Company has no further possession, control or dominion whatsoever over said gas (R. 38). Due to the denial of a hearing on the question of jurisdiction, hereinafter explained, other pertinent facts relating to the sale of gas to the New York State Natural Gas Corporation are not in the record, as, for example, that the gas produced in the Pennsylvania field tributary to the point of delivery alone exceeds the quantity sold to the New York State Natural Gas Corporation; that the gas so sold is delivered at the edge of the producing and gathering field; that the gas sold is sometimes interrupted in its flow to New York by being stored by the New York State Natural Gas Corporation in northern Pennsylvania; that said sale is made at the same rate as to industrial consumers; that said sale is made contingent upon the Company having gas to spare after having supplied the demands of all of its other customers; and that the Pennsylvania Public Utility Commission has expressly and specifically taken jurisdiction over the sale by the Company to the New York State Natural Gas Corporation.

On June 14, 1940, the Commission issued an order reciting that "The Peoples Natural Gas Company has made available to the representatives of the Commission certain books and records relating exclusively to the problem of the status of the said company as a natural-gas company within the purview of the Natural Gas Act" and directing that the Company under oath and

in writing show cause "Why said company should not be determined to be a natural-gas company within the purview of the Natural Gas Act." On June 28, 1940, the Company filed its sworn answer to said rule to show cause setting forth at length why it believed itself not to be a natural-gas company within the purview of said Act and why it was not amenable to the jurisdiction of the Commission in said proceeding; a copy of said answer is included in the record (R. 32). Said rule has never been disposed of and the Commission has never decided the question of jurisdiction.

Instead of deciding the question of jurisdiction, the Commission issued subpoenas *duces tecum* commanding the petitioners to produce many of the Company's records bearing solely on the question of costs, investments, revenues and rates (R. 16-19). The petitioners respectfully declined to produce said records on the ground that the Commission had no jurisdiction over them (R. 26-27). At the same time the petitioners, as always, gave the Commission complete access to all records of the Company bearing on the question of jurisdiction (R. 26). The Commission then filed a motion in the United States District Court for the District of Columbia to compel compliance with its subpoenas (R. 2). The petitioners promptly filed their answer to said motion (R. 25). The petitioners also filed a motion praying either that the Commission's motion be denied on the pleadings or that a full hearing, including the taking of the necessary evidence, be accorded the petitioners on the issue of the Commission's jurisdiction over the Company in this proceeding (R. 47). The Commission's motion was summarily granted on September 17, 1941, on the motions' calendar of the District Court, and the petitioners' motion for dismissal or assignment for trial on the question of jurisdiction was simultaneously denied (R. 49-50). The District Court refused to hear or permit the petitioners to introduce any evidence on the

question whether the Commission has jurisdiction over the Company in this proceeding—and this notwithstanding that the petitioners had their witnesses and evidence in court at the time and sought to introduce it (R. 55, 71).

The Court of Appeals for the District of Columbia affirmed the order of the District Court on February 16, 1942, and subsequently on April 13, 1942, denied a petition for rehearing (R. 78, 133).

Jurisdictional Statement.

The statutory provision believed to sustain jurisdiction is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938. The date of the judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed is February 16, 1942.

Statute Involved.

The following provisions of the Natural Gas Act of June 21, 1938 (c. 556, 52 Stat. 821, 15 U.S.C.A. §§ 717 and 717(a)(6)(7)) are here involved:

> Section 1. * * *
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2. When used in this Act, unless the context otherwise requires— * * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

Questions Presented.

1. When an administrative agency institutes an investigation and the respondent *bona fide* denies that the administrative agency has jurisdiction over it, and the administrative agency applies to a federal court for enforcement of a subpoena *duces tecum* issued by the administrative agency, is the respondent entitled to a full hearing on the question of jurisdiction and the court's adjudication thereof, before being compelled to comply with the subpoena?

2. Is a local gas company, the property and operations of which are all within a single state, and whose business essentially and predominantly is the production and gathering of natural gas and its distribution to ultimate consumers, subject to the Natural Gas Act because it sells in the producing field a small fraction of its surplus gas at the rate charged industrial consumers to another company which transports the gas, sometimes after storing it in the state of production and purchase, to another state for resale to ultimate consumers, the company first mentioned being regulated as to all of

its business, including the sale to the second company, by the state in which it operates?

Reasons Relied on for Allowance of Writ.

1. The Court of Appeals in this case has decided a question of substance relating to the construction or application of a statute of the United States which has not been, but should be, settled by this Court.

2. The Court of Appeals in this case has decided a federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court to review the judgment entered by the Court of Appeals for the District of Columbia in this case on February 16, 1942.

THE PEOPLES NATURAL GAS COMPANY,
EDWARD M. BORGER, PRESIDENT, THE PEOPLES NATURAL GAS COMPANY,

By WILLIAM WATSON SMITH,
WILLIAM STANLEY,
MAX O'RELL TRUITT,
CARL MCFARLAND,
JAMES B. SAYERS,
WILLIAM H. ECKERT,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

I.

The Opinions of the Courts Below.

The District Court wrote no opinion. The Court of Appeals filed two opinions, neither of which has yet been reported, but which are both in the record (R. 78, 133).

II.

Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked are stated in the foregoing petition (p. 5).

III.

Statement of the Case.

The case has been stated in the foregoing petition (pp. 1-5), which statement is hereby referred to and adopted as part of this brief.

IV.

Specification of Errors.

1. The Court of Appeals erred in affirming the order of the United States District Court for the District of Columbia.

2. The Court of Appeals erred in holding that the proceedings in the District Court constituted due process of law.

3. The Court of Appeals erred in holding that the corporate petitioner is subject to the Natural Gas Act.

4. The Court of Appeals erred in holding that the petitioners must comply with the subpoenas *duces tecum* issued by the Federal Power Commission.

V.

Summary of Argument.

When an administrative agency institutes an investigation and the respondent bona fide denies that the administrative agency has jurisdiction over it, and the administrative agency applies to a federal court for enforcement of a subpoena duces tecum issued by the administrative agency, the respondent is entitled to a full hearing in court on the question of jurisdiction, including the right to introduce all competent, relevant evidence, and to the decision by the courts of the question of jurisdiction so raised.

A local gas company, the property and operations of which are all within a single state and whose business essentially and predominantly is the production and gathering of natural gas and its distribution to ultimate consumers, is not subject to the Natural Gas Act, notwithstanding that it sells in the producing field a small fraction of its surplus gas at the rate charged industrial consumers to another company which transports the gas, sometimes after storing it in the state of production and purchase, to another state for resale to ultimate consumers, the company first mentioned being regulated as to all of its business, including the sale to the second company, by the state in which it operates.

ARGUMENT.

The denial of a full hearing, including the right to introduce competent and relevant evidence, on the question of jurisdiction of the Commission over the Company was a deprivation of property, we submit, without due process of law in violation of the Fifth Amendment to the United States Constitution. Because all of the Company's properties and operations are within the boundaries of the single State of Pennsylvania, because the Company's business is almost entirely confined to producing and gathering gas and furnishing it to residents and industries in western Pennsylvania, because the comparatively small amount of gas the Company sells to the New York State Natural Gas Corporation is on a more or less emergency basis, is merely incidental to the Company's business as a whole and is sold at the edge of the producing and gathering field in Pennsylvania and immediately upon completion of the production and gathering of the gas, because the New York State Natural Gas Corporation frequently stores the gas for months in Pennsylvania before removing it from that State, and because all of the Company's rates, including that charged the New York State Natural Gas Corporation, are regulated by the Pennsylvania Public Utility Commission, we submit that the Company comes within the exceptions in Section 1(b) of the Natural Gas Act above quoted (p. 5), providing that said Act shall not apply "to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The Company, therefore, raised the question of jurisdiction when the Commission first began to investigate it and has consistently sought a legal adjudication of that question ever since. The Commission, however, has never decided the question of jurisdiction, despite

the fact that the Commission on June 14, 1940, directed the Company to show cause why it did not come within the application of the Natural Gas Act—that rule has never been acted on. When the controversy was taken to court, the petitioners promptly filed their answer denying that the Commission had jurisdiction over them, prayed for a full hearing at which they could introduce evidence on the question of jurisdiction, instead of the mere ten minutes which are allowed each party on the motions' calendar under the rules of the District Court for the District of Columbia, and brought their witnesses and evidence into court when the Commission's motion was scheduled for disposition. The District Court refused to hear any of the petitioners' evidence or to permit the petitioners to introduce any testimony or exhibits, but summarily, and without writing any opinion, granted the Commission's motion for enforcement of its subpoenas and denied the petitioners' motion for a full hearing, including the right to introduce evidence. Such procedure, we submit, is not in accordance with the law of this country and deprived petitioners of the fundamental right to a full hearing before subjecting them to a search of their private affairs and the enormous burden and expense of a comprehensive examination of the Company's costs, investments, revenue, depreciation, contracts, classifications and rates.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, established the law that in a proceeding before a federal court to compel compliance with a subpoena of an administrative agency the respondent is entitled to a hearing and judicial determination of the question whether the administrative agency has jurisdiction over the respondent or the subject matter. This Court by Mr. Justice Harlan there said (p. 479):

"Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits."

Ellis v. Interstate Commerce Commission, 237 U. S. 434 (Holmes, J.), is a leading case on the subject. The District Court there ordered compliance with an administrative subpoena but this Court reversed, holding that much of the information sought "concerned matters into which the Commission was not authorized to inquire."

In *Federal Power Commission v. Metropolitan Edison Co.,* 304 U. S. 375, this Court, in a unanimous opinion by Chief Justice Hughes, said of an application by the Federal Power Commission to a federal court for enforcement of the Commission's subpoena (p. 386):

"Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity to contest its validity."

Other cases holding that when an administrative agency applies to a federal court for enforcement of the

former's subpoena, the respondent is entitled to a full hearing before the court on the question of jurisdiction, and a judicial determination of that question, before being compelled to submit to the subpoena, are *Dupont de Nemours & Co. v. Boland,* 85 F. (2d) 12, 15 (C. C. A. 2); *East Ohio Gas Co. v. Federal Power Commission,* 115 F. (2d) 385 (C. C. A. 6); *Cudahy Packing Co. v. National Labor Relations Board,* 117 F. (2d) 692, 694 (C. C. A. 10); *General Tobacco & Grocery Co. v. Fleming,* 125 F. (2d) 596, 599 (C. C. A. 6); *Securities & Exchange Commission v. Tung Corp.,* 32 F. Supp. 371, 375 (Ill.); and *Perkins, Secretary of Labor, v. Endicott-Johnson Corp.,* 37 F. Supp. 604, 606; 40 F. Supp. 254, 255 (N. Y.). In the very recent *General Tobacco & Grocery Co.* case, *supra,* Judge Martin for the Circuit Court of Appeals for the Sixth Circuit said (p. 599):

> "It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

In the *Endicott-Johnson* case, *supra,* District Judge Bryant said (p. 606):

> "Viewing this controversy from a practical as well as a legal angle, a pre-determination of the right to examine before actual examination seems to be the logical course to follow. In these days of stress, when the time of courts, Government officials and manufacturers is at a premium, it would seem that a saving of both time and money may be effected through determination of right to examine before beginning the actual examination of hundreds and thousands of records."

As may readily be inferred from the subpoenas *duces tecum* involved in this case (R. 17), a multitude of books and records will be required to satisfy the Commission's demands in the instant case.

The text authorities agree that an administrative agency "may not obtain an order enforcing its subpoena unless it shall first have established its jurisdiction in the premises": 1 *Pike & Fischer* on "Administrative Law" § 44g.31.

Assuming that the question of jurisdiction of the Commission over the Company should be affirmatively decided before the Commission may lawfully subject the Company to a rate case, that question of jurisdiction, we submit, cannot be decided upon the present record. Whether the Commission has jurisdiction over this Company depends upon facts as well as law. The answer filed by the petitioners in the District Court, besides affirmatively pleading what the Company does in a general way, specifically denies that it transports natural gas in interstate commerce or that it sells natural gas in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial or any other use (R. 31). Questions of fact are, therefore, raised by the pleadings and many relevant facts concerning the sale to the New York State Natural Gas Corporation are not set forth in the Commission's motion or in the answer thereto, as hereinbefore pointed out (p. 3). For example, it is of vital concern under *Coe v. Errol,* 116 U. S. 517, 528, and *Federal Compress Co. v. McLean,* 291 U. S. 17, 21, that the gas purchased by the New York State Natural Gas Corporation from The Peoples Natural Gas Company is often stored by the former in Pennsylvania, thereby substantially interrupting its movement to New York. It is significant also under *Peoples Natural Gas Co. v. Public Service Commission,* 270 U. S.

550, 555, that the gas produced in the Pennsylvania field tributary to the point of delivery is more than sufficient to supply the amount sold to the New York State Natural Gas Corporation. Under the terms of the Natural Gas Act exempting therefrom the production and gathering of natural gas, and the construction placed by the Commission itself upon that language of the statute *In the Matter of Columbian Fuel Corp.,* 35 P.U.R. (N.S.) 3,[1] it is of utmost importance that the sale to the New York State Natural Gas Corporation is made and the gas delivered at the edge of the producing basin, upon completion of the producing and gathering of the gas. This Court has repeatedly held that the distribution and sale of gas to local consumers is intrastate commerce, and, therefore, subject to regulation or taxation by the states: *Public Utilities Commission v. Landon,* 249 U. S. 236, 245; *Missouri v. Kansas Gas Co.,* 265 U. S. 298, 309; *East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465, 471; *Southern Gas Corp. v. Alabama,* 301 U. S. 148, 154;

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1. *In the Matter of Columbian Fuel Corp., supra,* the Commission held that it had no jurisdiction over a company which was engaged in producing and gathering natural gas in Kentucky and selling that gas in Kentucky at the termini of its gathering lines to another company, which latter company simply transported and resold the gas in interstate commerce for consumption outside Kentucky. There was a continuous and uninterrupted flow of gas from the producing fields in Kentucky to the consumers in other states. The conclusion of the Commission in that case is stated as follows (p. 10):

> "We conclude, therefore, that it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce, as in this case, are made as an incident to and immediately upon completion of such person's production and gathering of said natural gas and who are not otherwise subject to the jurisdiction of this Commission."

Memphis Natural Gas Co. v. Beeler, 10 U. S. L. W. 4309 (decided March 30, 1942). By analogy, the production and gathering of natural gas and its sale to another at the gathering point, the seller having no further control over the gas after said sale, is equally intrastate commerce and subject to regulation by the states—and this notwithstanding that the buyer intends immediately or later to transport the gas into another state for consumption there. This position is supported by such cases as *Coe v. Errol, supra; Kidd v. Pearson,* 128 U. S. 1; *McCluskey v. Marysville & Northern Ry. Co.,* 243 U. S. 36; *Federal Compress Co. v. McLean, supra;* and *Dep't. of Treasury of Indiana v. Wood Preserving Corp.,* 313 U. S. 62. In *McGoldrick v. Berwind-White Co.,* 309 U. S. 33, 47, this Court expressly placed the production, sale or other dealing with "property, shipped interstate, before its movement begins, or after it ends," in the same category, i. e., they are both intrastate commerce and subject to local regulation or taxation. Except to the negligible extent that the producer or gatherer of any commodity consumes it himself, it must be sold, and the sale of the commodity by the local producer or gatherer, at the place of production is, therefore, an incident to and part of the local, intrastate business of producing or gathering said commodity—regardless of the fact, as held in *Kidd v. Pearson, supra; Federal Compress Co. v. McLean, supra;* and *Dep't. of Treasury of Indiana v. Wood Preserving Corp., supra,* that the purchaser intends to remove the commodity outside the state of purchase. The production or gathering of goods is not an end in itself, and would be of little avail if the goods were not sold. Particularly in view of the legislative history of the Natural Gas Act, it is also highly material that the Pennsylvania Public Utility Commission has, since the Company's answer to the Commission's rule to show cause was filed, expressly taken jurisdiction over the rate charged

by the Company to the New York State Natural Gas Corporation for the gas sold to the latter. As said in *Missouri v. Kansas Gas Co., supra* (p. 309): "In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance." Under all of the above-cited authorities the regulation by the Pennsylvania Public Utility Commission of the rate in question is proper and valid. The legislative history of the Natural Gas Act shows that it was not intended to displace any state regulation of gas rates or to impose duplicate regulation. Other pertinent facts might be mentioned, but it is submitted that enough has been said to show that facts which are worthy at least of careful consideration, even if they may not be decisive in the petitioners' favor, have been excluded from consideration by the action of the District Court in summarily granting the Commission's motion without permitting the petitioners to introduce their evidence of facts bearing materially on the question of the Commission's jurisdiction over the Company. Because the court of first instance peremptorily refused to admit any evidence and rejected the petitioners' motion for a hearing on the facts, the case should be remanded, we submit, to the District Court to take evidence in order that the basic question of jurisdiction may be legally adjudicated.

The error committed by the Court of Appeals, we respectfully submit, was in attempting to decide the ultimate question whether the Company is subject to the jurisdiction of the Commission upon an inadequate record, which did not contain many pertinent facts bearing upon the determination of that ultimate question of jurisdiction. That the record is so inadequate is no fault of the petitioners, because they did their best to introduce evidence to establish the material facts in the court of first instance, but were denied that fundamental

right. The Court of Appeals bases its whole decision upon the mere recital in an *ex parte* order made by the Commission directing its counsel to invoke the aid of the United States District Court to enforce its subpoenas, to the effect that the testimony adduced at a certain hearing showed "that Peoples sells natural gas at its Pew compressor station in Clarion County, Pennsylvania, to New York State Natural Gas Corporation, an affiliated company, and that the latter immediately transports said natural gas into the State of New York where it sells the same to others for resale for ultimate public consumption" (R. 79). A copy of said order was attached as Exhibit "F" to the motion filed by the Commission in the District Court, but the only averment in said motion with reference to said Exhibit "F" was paragraph IX of said motion, reading as follows (R. 6): "By its order dated August 9, 1941, true copy of which marked 'Exhibit F' is annexed hereto and made a part of this motion, the Commission authorized that the aid of this Court be invoked pursuant to Section 14(d) of the Natural Gas Act to compel the compliance by said The Peoples Natural Gas Company and Edward M. Borger with the aforesaid subpoenas duces tecum." We do not dispute that the Commission made the *ex parte* order, Exhibit "F", or that by such order the Commission authorized its counsel to invoke the aid of the District Court, and, therefore, there was nothing in paragraph IX of the Commission's motion for us to deny in our answer. But it does not follow, we submit, that we agree that the gas is unqualifiedly "immediately" transported by the New York State Natural Gas Corporation from Clarion County, Pennsylvania, into New York State. On the contrary, as we would show by evidence, the New York State Natural Gas Corporation frequently stores the gas purchased by it from The Peoples Natural Gas Company in the ground in Tioga County, Pennsylvania, where the gas may remain for months

before it is finally transported into New York State. The Court of Appeals based its decision upon only a fragmentary knowledge of the situation, whereas actually there are other facts, unknown to the Court of Appeals and not appearing from the present record due to the action of the District Court in refusing to permit the petitioners to introduce any evidence, which materially enter into a correct determination of the question whether the Company involved—essentially a purely local enterprise, completely regulated by the state of its operations—is subject to the jurisdiction of the Federal Power Commission.

The legislative history of the Natural Gas Act clearly shows that it was not intended to apply to any of the gas industry which was already subject to regulation by the states, and that it was intended to apply only to the interstate pipe line companies which sold the gas which they transported at wholesale to distributing companies. Thus, in the report of the House Committee it is said of this Act[2]:

> "There is no intention in enacting the present legislation to disturb the States in their exercise of * * * jurisdiction. * * *
>
> The basic purpose of the present legislation is to occupy (the) field in which the Supreme Court has held that the States may not act. * * *
>
> The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. * * *
>
> This legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State commissions."

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2. House Report No. 709, 75th Cong., 1st Sess., 1937, pp. 1-3.

In the Senate debates over the Natural Gas Act it was said that "It is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale."[3]

In the hearings on the legislation which ripened into the Natural Gas Act, Congressman Lea, who presided and by whose name the Natural Gas Act is popularly known, put as a question to the solicitor for the Federal Power Commission the precise situation involved in the case at bar:

> *Mr. Lea.* * * * Suppose that the A company owns a gas supply and the B company transmits it into another State, distributes it to a local company for distribution. Now suppose the question arises as to whether or not the charges which the A company makes against the B company for the gas is reasonable. What, if any, authority would the commission have on that question under this bill?
>
> *Mr. DeVane* [solicitor for the Commission]. * * * Concerning the price paid to the A company, there is no control of the gathering rate; the Commission would not have jurisdiction.

Solicitor DeVane's conclusion was reiterated—that the proposed Natural Gas Act would confer no federal jurisdiction as to the "price that is paid to the gatherer" or "to the man that produces it."[4]

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3. 81 Cong. Rec. 9312. To the same effect see Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423, 74th Cong., 1st Sess., Pt. 1, 1935, pp. 76-96 *et seq.; Id.* Pt. 3, pp. 1634, 1842, 1866, 1909; Hearings, Natural Gas, on H. R. 11662, 74th Cong., 2nd Sess., 1936, pp. 12, 17, 27, 40-42, 52, 81, 83, 85; House Report No. 2651, Natural Gas, on H. R. 12680, 74th Cong., 2nd Sess., 1936, pp. 1-3; 81 Cong. Rec. 6721-6725, 8918, 9312-9315.

4. Hearings, Natural Gas, on H. R. 11662, 74th Cong., 2nd Sess., 1936, pp. 12, 17.

In concluding its determination of the intent of Congress in passing the Natural Gas Act, the Commission in the *Columbian Fuel Corp.* case, *supra,* said (pp. 9-10):

> "Clearly, Congress thought it was closing the gap in regulation of the natural gas industry by providing Federal Power Commission regulation of companies whose main function was to transport natural gas through interstate pipe lines and sell gas so transported at city gates for resale to ultimate consumers."

A statute is to be interpreted in the light of its legislative history: *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 489. This Court in *Maurer v. Hamilton,* 309 U. S. 598, also recently said (p. 614):

> "As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose."

In the light of the legislative history of the Natural Gas Act, it would be clear if we had been permitted to show all the material facts that it was not intended to apply to The Peoples Natural Gas Company. There is no "gap" in the regulation of this Company; all of its operations and rates are regulated by the Pennsylvania Public Utility Commission, including specifically and expressly the rate charged the New York State Natural Gas Corporation. Furthermore, The Peoples Natural Gas Company is not one "whose main function [is] to transport natural gas through interstate pipe lines and sell gas so transported at city gates for resale to ultimate consumers."

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that a question of substance relating to the construction or application of a statute of the United States which has not been, but which should be, may be settled by this Court, and that the decision in this case be made to conform with applicable decisions of this Court, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Court of Appeals for the District of Columbia and finally reverse it.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1234

THE PEOPLES NATURAL GAS CO., AND EDWARD M. BORGER, PRESIDENT, THE PEOPLES NATURAL GAS CO., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court entered its order (R. 49–50) without an opinion. The original (R. 78–81) opinion and the opinion on rehearing (R. 133–135) of the United States Court of Appeals for the District of Columbia are not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on February

16, 1942 (R. 82). A petition for rehearing was filed on March 13, 1942 (R. 82), and denied on April 13, 1942 (R. 133–135). The petition for a writ of certiorari was filed on May 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1942.

QUESTIONS PRESENTED

At an interim stage of a rate investigation, the Federal Power Commission issued subpoenas directing petitioners to produce certain books and records and, upon their refusal, filed a motion in the District Court for an order to compel obedience. An order of the Commission was annexed as an exhibit to the motion and recited that the petitioner company sells gas in Pennsylvania to a New York affiliate which immediately transports the gas to New York and sells it to others for resale to ultimate consumers. Petitioners' answer did not deny this statement, although it alleged that the company was not engaged in the transportation for sale of gas "in interstate commerce," and affirmatively admitted that the company sells gas to the New York company for resale to ultimate consumers in New York. The questions are

1. Whether, the transaction set forth in the Commission's order and admitted in the answer constitutes a sale "in interstate commerce" within the meaning of the Natural Gas Act;

2. Whether the Commission was entitled to judgment on the pleadings.

STATUTE INVOLVED

The pertinent portions of the Natural Gas Act of 1938 are set forth in the Appendix, *infra*, pp. 17–20.

STATEMENT

The Natural Gas Act of 1938 provides for the regulation by the Federal Power Commission of natural gas companies engaged in the transportation of natural gas "in interstate commerce" or in the sale "in interstate commerce" of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. Sec. 1 (b). The Act does not apply "to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Sec. 1 (b). All rates and charges made by such natural gas companies "for and in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission" must be just and reasonable and any other rate is unlawful. Sec. 4. The Commission, on its own motion or on complaint, is empowered to investigate the rates charged by any natural gas company in connection with any transportation or sale of natural gas subject to the Commission's jurisdiction and to determine just and reasonable rates. Sec. 5 (a).

On March 12, 1940, the Federal Power Commission ordered a rate investigation to determine whether the Peoples Natural Gas Company was a natural gas company under the Natural Gas Act and whether any rates charged by it were unjust or unreasonable in violation of the provisions of the Act (R. 8–10).[1] On December 21, 1940, the Commission ordered that a public hearing be had in the proceedings and that the petitioner gas company produce at that hearing various books and records, including its general and subsidiary ledgers, journals, vouchers, corporate records, and financial statements, which the Commission found were relevant and material to the conduct of the rate proceeding (R. 10–13). After several days of hearings (R. 14) the company refused to produce these books and records voluntarily, although it permitted access to such of its records as contained information bearing on its status as a natural gas company as defined in the Natural Gas Act (R. 3, 4, 15, 46). The Commission then ordered that subpoenas *duces tecum* be issued directing the production of the company's ledgers at a public hearing (R. 13–16), and such subpoenas were duly issued and served upon both the

[1] This investigation was instituted because the price which the petitioner gas company charged for gas sold at wholesale to its affiliate, New York State Natural Gas Corporation, had a substantial bearing on the reasonableness of the latter's rates, then under investigation by the Federal Power Commission upon complaint of the New York Public Service Commission (R. 8–9).

petitioners (R. 16–18). Upon petitioners' refusal to obey the subpoenas (R. 22–24), the Commission issued an order authorizing the invocation of the aid of the District Court of the United States for the District of Columbia in the enforcement of the subpoenas (R. 19–24).

Pursuant to Section 14 (d) of the Natural Gas Act the Commission brought the present proceeding in the District Court for the District of Columbia for an order requiring the petitioners to produce the ledgers demanded by the administrative subpoenas (R. 2–24). The Commission's motion recounted the steps in the administrative proceedings (R. 3–6) and the petitioners' refusal to honor the subpoenas (R. 5–6), and alleged that it was necessary and essential to the conduct of the pending rate investigation that the petitioners be required to produce the specified books and records because these books and records contained information and data with respect to the costs, revenues, and expenses of the petitioner company "all of which information and data is essential to enable the Commission to determine whether the rates and charges of The Peoples Natural Gas Company subject to the jurisdiction of the Commission, are unjust, unreasonable, unduly discriminatory, or preferential" (R. 6). Copies of the various orders of the Commission were attached as exhibits to the application and expressly made a part of it (R. 8–24). The body of the Commission's motion included no specific

allegations that it had jurisdiction, although it referred to the pending inquiry and investigation as "lawful" (R. 4, 5, 6). But the order of August 9, 1941, authorizing the invocation of judicial aid, which was incorporated as Exhibit F by reference in Paragraph IX of the application (R. 6), expressly averred "that Peoples sells natural gas at its Pew compressor station in Clarion County, Pennsylvania, to New York State Natural Gas Corporation, an affiliated company, and that the latter immediately transports said natural gas into the State of New York where it sells the same to others for resale for ultimate public consumption; the sale of natural gas by Peoples to New York State Natural Gas Corporation is a continuous process and appears to be a sale in interstate commerce of natural gas for resale for ultimate public consumption." [2]

Petitioners' answer (R. 25–46) denied that the company is a natural gas company within the meaning of the Natural Gas Act, that it is subject to the jurisdiction of the Commission (R. 25), or that it sells natural gas in interstate commerce for resale for ultimate public consumption (R. 31), but the answer did not deny the factual statements contained in the order of August 9,

[2] Other orders of the Commission, also incorporated by reference in the motion, state that "The Peoples Natural Gas Company sells natural gas to the New York State Natural Gas Corporation in Clarion County, Pennsylvania, for transportation and resale by the latter company in the State of New York * * *" (R. 11, 13).

1941. The gist of the answer was that the court must find that the company is a natural gas company subject to the Act and to the Commission before the subpoenas may be enforced (R. 25, 26, 27, 28, 30). For a statement of the company's business and operations, reference was made to the company's answer in the administrative proceeding (R. 31–45). The administrative answer alleged, among other things, that all of the company's property is located in Pennsylvania and all its business is carried on there (R. 33), that it is subject to regulation by the Pennsylvania Public Utilities Commission (R. 34, 40, 42), that its sales to the New York State Natural Gas Corporation began in 1939 and constitute only a very small percentage of its total sales (R. 35–36), that the gas sold by the company is either produced in its own wells in Pennsylvania, purchased from other producing gas from Pennsylvania wells, or purchased from an affiliated West Virginia company producing in that state (R. 38). It alleged further that the sale of gas to the New York company involves only the production and gathering of natural gas, which was asserted to be exempted from regulation by the Commission by section 1 (b) of the Act (R. 41), and it also described the sale of gas to the New York company as follows: "Gas so sold to New York State Natural Gas Corporation is delivered to that Company at the outlet of the Respondent's Pew Compression Station located in Limestone Town-

ship, Clarion County, Pennsylvania, from which point the gas is transported in a northeasterly direction a distance of approximately 90 miles to a point in Hebron Township, Potter County, Pennsylvania, through a 12'' pipe line owned by the Respondent but leased to and operated by the New York State Natural Gas Corporation under an agreement of lease dated January 2, 1940, at which point said 12'' pipe line connects with the pipe lines owned by New York State Natural Gas Corporation * * * Upon the delivery of the gas by Respondent to New York State Natural Gas Corporation at Respondent's Pew Compressing Station as aforesaid, the gas passes out of the possession of the Respondent and thereafter Respondent has no control over the transportation, sale or disposition of said gas'' (R. 37–38).

After answer, petitioners moved for dismissal of the Commission's motion on the ground that no allegation of its jurisdiction over the company had been made by the Commission, or, in the alternative, for a full hearing, including the taking of testimony on the issues of fact as to the Commission's jurisdiction raised by the petitioners' answer (R. 47–48). The cause came on for a hearing in the Motions Court of the District Court, and counsel for the parties were heard (R. 54–71). Counsel for petitioners admitted in open court that on many days of the year, petitioner company sells gas to the New York State Natural Gas Corporation for transportation into

New York and for resale there (R. 69–70). The District Court thereafter entered its order enforcing the subpoenas and denying petitioners' motions (R. 49–50).

On appeal, the Court of Appeals for the District of Columbia affirmed the District Court's order on the ground that on the admitted facts the Commission had jurisdiction over the sales to the New York company, and that a further hearing was therefore unnecessary (R. 78–82). A petition for rehearing was filed (R. 83–129) directed solely to the question of the coverage of the Act (R. 91). The petition was denied in an opinion rendered April 12, 1942 (R. 133–135).

ARGUMENT

The books and records sought to be subpoenaed are all relevant in determining the reasonableness of the petitioner company's charges for the sale of gas to its New York affiliate (R. 81).[3] Petitioners contend, however, that they cannot be required to produce any records bearing on the reasonableness of these charges until the Commission's jurisdiction has been finally established after a full hearing in an independent judicial proceeding (Pet.,

[3] Petitioners' answer alleges that the cost of the gas delivered to any of its purchasers may be determined only by reference to the cost of all gas entering into their pipeline system. R. 40. Cf. *Arkansas Gas Co.* v. *Dep't*, 304 U. S. 61.

The Commission has repeatedly asserted that it intends to regulate only those of the Company's rates over which it has jurisdiction. R. 3, 6, 9–10, 11, 14, 20.

pp. 11–14; R. 25). They further contend that the State of Pennsylvania has power to regulate the sale to the New York company, that the Natural Gas Act was not intended to extend the Commission's jurisdiction to transactions subject to state control, and that the Commission is therefore without jurisdiction (Pet. pp. 14–21). The court below agreed that the Commission's jurisdiction must first be judicially determined (R. 81).[4] It held, however, that on the uncontradicted facts found in the Commission's order directing its counsel to institute this proceeding and attached as Exhibit F to the Commission's motion, as well as the facts alleged in the petitioners' answer and conceded in open court, the sale to the New York company was a transaction "in interstate commerce" within the meaning of the Natural Gas Act and that there was therefore no issue of fact to be tried (R. 79, 133–135). The judgment below sustaining the Commission's jurisdiction was plainly correct and presents no question warranting review by this Court.

1. The Commission found, after hearing, that the petitioner company sells gas in Pennsylvania to its

[4] In the event that the petition for a writ of certiorari is granted, we reserve the right to urge that the District Court was not in any event required to determine whether the petitioner company is subject to the Act as a condition precedent to enforcement of the subpoena. *Perkins* v. *Endicott Johnson Corp.* (C. C. A. 2d), No. 218, October Term, 1941, decided May 6, 1942, reversing *Perkins* v. *Endicott Johnson Corp.*, 37 F. Supp. 604, 40 F. Supp. 254 (N. D. N. Y.) cited at page 13 of petitioners' brief.

New York affiliate and that the latter immediately transports the gas to New York and sells it to others for resale to ultimate consumers in that state (R. 21). The sale to the New York company was affirmatively admitted by petitioners in their answer (R. 35, 37, 39) and in open court (R. 69–70). If these are accepted as the facts, as we contend that they must be (*infra*, pp. 14–16), the activities of petitioning company do not merely "affect" commerce, but it is engaged in the sale of gas "in interstate commerce" within the meaning of the Natural Gas Act. It is settled that a sale of commodities for transportation and use in interstate commerce is a transaction "in interstate commerce". *Currin* v. *Wallace*, 306 U. S. 1, 10; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 568–569; *Illinois Nat. Gas Co.* v. *Central Ill. Pub. Serv. Co.*, No. 100, this Term, decided January 5, 1942. And, prior to the enactment of the Natural Gas Act, the sale of gas or electricity at wholesale in the state of origin for resale in another state was held to constitute interstate commerce beyond the reach of state regulation. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83; cf. *Public Utilities Comm.* v. *Landon*, 249 U. S. 236, 245; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277; *East Ohio Gas Co.* v. *Tax Comm.*, 283 U. S. 465, 470; *Peoples Gas Co.* v. *Public Serv.*

Comm., 270 U. S. 550, 554.[5] Whether state regulation of such transactions would now be deemed an unlawful burden on interstate commerce is immaterial. The Natural Gas Act was enacted for the express purpose of closing the "gap" in utility regulation created by the *Attleboro* and *Kansas Gas Company* cases and the term "in interstate commerce" as used in the Act must therefore be construed to reach interstate sales which had been exempted from state control under those decisions at the time the Act was passed. *Illinois Nat. Gas Co.* v. *Central Ill. Pub. Serv. Co.*, No. 100, this Term, decided January 5, 1942; cf. *Parker* v. *Motor Boat Sales*, 314 U. S. 244.[6]

The other circumstances suggested by petitioners, even if assumed to exist, do not affect the jurisdiction of the Commission. It is immaterial that the sale is made by the producer at the place of production (*Peoples Gas Co.* v. *Public Serv.*

[5] Interstate retail rates, being regarded as local matters, were held subject to state regulation (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; *Public Utilities Comm.* v. *Landon*, *supra*; *East Ohio Gas Co.* v. *Tax Comm.*, *supra*).

[6] Moreover, the admitted affiliation (R. 11, 14, 34, 38, 61, 66) of the Pennsylvania and the New York companies is sufficient basis for investigation of the petitioner company's books and records in order to determine the reasonableness of the New York company's charges in a pending related rate investigation. Section 8 (c) of the Natural Gas Act; cf. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300. The New York company is admittedly engaged in the interstate sale and transportation of gas for resale (Pet. p. 3, 18–19; R. 35, 37, 69–70).

Comm., 270 U. S. 550, 554; *East Ohio Gas Co.* v. *Tax Comm.*, 283 U. S. 465, 470),[7] or that the gas sold for interstate transportation is only a small proportion of the total produced (*Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83, 90) or that it is less than the amount produced in the field at the point of delivery.[8] The suggestion that the gas sold to the New York company is "sometimes" or "often" (Pet., pp. 3, 14; R. 96, *n.* 9) stored, raised for the first time in the petition for rehearing below (R. 96, *n.* 9), is an implied admission that it is at least "sometimes" immediately transported to New York and would seem irrelevant in any event. Cf. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298.

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[7] If petitioners intend to suggest that a sale of commodities for interstate transportation is no part of "interstate commerce" and that such commerce does not begin until the interstate movement begins, the argument is plainly untenable. *Currin* v. *Wallace*, 306 U. S. 1, 10; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55. The decision of the Commission in *In the Matter of Columbian Fuel Corporation*, 35 P. U. R. (N. S.) 3, relied on by petitioners, turns in part on the narrow circumstance that the pipe lines of the producer's vendee were all located in the state of origin and the vendee resold the gas in the same state for transportation. Moreover, the Commission reserved the right to reconsider its conclusion in the future, particularly where, as here, affiliation between vendor and vendee exists.

[8] In *Peoples Gas Co.* v. *Public Serv. Comm.*, 270 U. S. 550, 555, relied on by petitioners, the gas in question was sold for consumption in Pennsylvania by a Pennsylvania producer and it was therefore material, in determining whether the sale was intrastate, whether the gas sold was produced locally. Here, the gas, from whatever field produced, is transported to an extra state destination.

2. The Commission was entitled to judgment on the pleadings. The facts recited in the order annexed as Exhibit F to the Commission's motion in the District Court constituted a sufficient averment of the Commission's jurisdiction and petitioners were required to contravene them in order to put the Commission's jurisdiction in issue. Rule 10 (c) of the Federal Rules of Civil Procedure makes exhibits attached to a pleading "a part thereof for all purposes", and the allegations of such exhibits must not be disregarded in determining whether the pleading states a cause of action, or a valid defense, or sufficiently alleges jurisdiction. *Sinclair Refining Co.* v. *Stevens,* 123 F. (2d) 186 (C. C. A. 8th).[9] And any facts properly pleaded which are not denied must be taken as admitted. Rule 8 (d) of the Federal Rules of Civil Procedure; *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522, 532. The facts set forth in Exhibit F are nowhere denied

[9] While the Federal Rules are not applicable in their entirety in proceedings to enforce administrative subpoenas (*Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. (2d) 692, 694 (C. C. A. 10th); *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F. (2d) 450, 451 (C. C. A. 6th); *Perkins* v. *Endicott Johnson Corp.* (C. C. A. 2d), No. 218, October Term 1941, decided May 6, 1942; Note (1941) 8 U. Chi. L. Rev. 592; 2 Pike & Fischer, Federal Rules Service 511), they may apply where, as here, they are fully adapted to the summary character of the proceeding. *Perkins* v. *Endicott Johnson Corp., supra.* In any case, the rule embodied in Rule 10 (c) rests on accepted principles of modern pleading practice and should be enforced generally. 1 Moore's Federal Practice, sec. 10.03, p. 612.

in petitioners' answer. The allegation that petitioner company is not "a natural gas company" and is not engaged in transporting or selling gas "in interstate commerce", within the meaning of the Natural Gas Act (R. 25, 31), is merely a conclusion of law. Moreover, the sale to the New York company for resale was affirmatively admitted by petitioners in their answer (R. 35, 37, 39) and in open court (R. 69–70, 80).

The facts established by the uncontradicted allegations and admissions, as we have shown, establish the Commission's jurisdiction. In these circumstances, if the proceeding had been a plenary civil action in which the only issue was one of jurisdiction, judgment on the pleadings would properly have been rendered on motion of the plaintiff. Rule 12 (c) of the Federal Rules of Civil Procedure; *Gibbs* v. *Buck,* 307 U. S. 66, 71, 72; *Beal* v. *Missouri Pacific R. Co.,* 312 U. S. 45, 51. There is certainly no less reason to adopt a similar expeditious procedure in a summary proceeding to enforce an administrative subpoena. Cf. *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board,* 122 F. (2d) 450, 451 (C. A. A. 6th); *Perkins* v. *Endicott Johnson Corp.* (C. C. A. 2d), No. 218, October Term 1941, decided May 6, 1942.

Moreover, petitioners' suggestion as to the facts which might be disclosed by evidence (Pet. pp. 14–17), far from showing the necessity for a full hearing, plainly establish that there is no material issue of fact to be tried. Some of the qualifying circumstances hypothesized in the peti-

tion were averred in the answer (R. 34, 36, 38–9, 40, 42), others are advanced for the first time in this Court,[10] and all of them, as we have shown above (see pp. 11–13), are irrelevant.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1942.

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[10] It was not until the filing of the petition for a writ of certiorari in this Court that petitioners injected into this proceeding the allegation "that the gas produced in the Pennsylvania field tributary to the point of delivery alone exceeds the quantity sold to the New York State Natural Gas Corporation," and some of the other allegations contained on page 3 of the petition. No such claims were made in the courts below, even in the petition for rehearing in the Court of Appeals. The suggestion that the gas is "sometimes" stored in Pennsylvania by the New York company (Pet. pp. 3, 14) was first made in a footnote to the petition for rehearing in the court below (R. 96, *n.* 9).

APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821, 15 U. S. C. secs. 717–717w, are as follows:

> SEC. 1. * * * (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> SEC. 2. When used in this Act, unless the context otherwise requires—
>
> * * * * *
>
> (5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.
>
> (6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
>
> (7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as

such commerce takes place within the United States.

* * * * *

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

* * * * *

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge,

classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * * * *

SEC. 14. * * * (d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer desig-

nated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

* * * * *

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No. 1234

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

THE PEOPLES NATURAL GAS CO. and EDWARD M. BORGER, President, The Peoples Natural Gas Co.,

Petitioners,

vs.

FEDERAL POWER COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR PETITIONERS.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

IN THE

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REPLY BRIEF FOR PETITIONER.

~~Reply Brief in Opposition.~~

In footnote 6 on page 12 of its brief in opposition, Respondent refers to the affiliation between The Peoples Natural Gas Company and New York State Natural Gas Corporation as vesting the Respondent with jurisdiction. But this is a proceeding solely against The Peoples Natural Gas Company (R. 2, 18) as to rates at which local sales are made within the State of Pennsylvania, heretofore and now regulated by the State of Pennsylvania. As set forth in the brief in support of the petition for certiorari (pp.

19-20), Congress expressly intended to leave state jurisdiction undisturbed. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, cited by Respondent, merely holds that a state utilities commission can look into the reasonableness of wholesale rates paid by a local distributing company to an affiliated interstate carrier from which it receives gas. This doctrine merely confirms state jurisdiction over the sale by The Peoples Natural Gas Company to the New York State Natural Gas Corporation which, as the legislative history of the Natural Gas Act clearly shows, it was not the intention of Congress to oust or supplant with jurisdiction of the Federal Power Commission.

Respectfully submitted,

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